Supreme Court, U. S.
FILED
AUG 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1267

EXAMINING BOARD OF ENGINEERS, ARCHITECTS AND SURVEYORS, etc., *Appellants*

v.

MARIA C. FLORES DE OTERO, *Appellee*

BOARD OF EXAMINERS OF ENGINEERS, ARCHITECTS AND SURVEYORS, AND THE MEMBERS OF SUCH BOARD, *Appellants*

v.

SERGIO PEREZ NOGUERIO, *Appellee*

On Appeal from the United States District Court for the District of Puerto Rico

BRIEF OF APPELLEES

MAX RAMIREZ DE ARELLANO
Attorney for María C. Flores de Otero

DR. SANTOS P. AMADEO
Attorney for Sergio Pérez Noguerio
Avenida Borínquen, 2067
Santurce, Puerto Rico 00914
(809) 726-3725

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

12463-8-75

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. Is an Alien Entitled to the Same Protection Under the Fourteenth Amendment as a Citizen?	3
II. Can 42 U.S.C.A. § 1983 be Invoked by a Person Residing in Puerto Rico to Protect Fundamental Personal Constitutional Rights?	4
A. Does 42 U.S.C.A. Apply to the Territories Generally?	4
B. Is it the Purpose of 42 U.S.C.A. § 1983 to Include Puerto Rico within its Scope?	5
III. Can These Questions Involving Fundamental Personal Constitutional Rights be Decided Without the Need for Abstention?	10
IV. Should this Court Apply the Strict Test of *In Re Griffiths* to the Justification Advanced by the Commonwealth for the Citizenship Requirement?	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:

Acevedo v. Colón, 377 F. Supp. 1332 (1974)	13
Americana of Puerto Rico v. Kaplus, 368 F.2d 431 (3rd Cir., 1966)	9
Arbona v. Kenton, 126 F. Supp. 366 (D.C.N.Y. 1954)	9
Balzac v. Porto Rico, 258 U.S. 298 (1922)	5

Page

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 5
Carrión v. González, 125 F. Supp. 819 (D.C.P.R. 1954) . 9
Cintrón v. State Board of Education, 384 F. Supp. 674 (1974) 11, 13
Consentino v. ILA, 126 F. Supp. 420 (D.C.P.R. 1954) .. 9
Cooperativa de Seguros v. Manuel San Juan, 289 F. Supp. 983 (D.C.P.R. 1968) 9
Condico Dev't. Co. v. Santiago Vázquez, 354 F. Supp. 1355 (1972) 9
Dandridge v. Williams, 397 U. S. 471 (1970) 14, 15
District of Columbia v. Carter, 409 U. S. 418 (1973) 2, 4, 5, 6, 7, 8,
Dombrowski v. Pfister, 380 U. S. 479 (1965) 12
Downes v. Bidwell, 182 U. S. 244 (1901) 5
Empresas Capote, Inc. v. Superior Court, Case No. 0-75-14 16
England v. Louisiana Medical Examiners, 375 U. S. 411 (1964) 14
Fornaris v. The Ridge Tool Co., et al., 400 U. S. 41 (1970) 11, 13
González v. González, 385 F. Supp. 1226 13
Harman v. Forssenius, 380 U. S. 528 (1965) 12
Harris County Comm. Court, et al., v. Moore US (1975) 10, 11, 12
Highland Realty, Inc. v. Tribunal Superior, Civil No. 0-73-167, Opinion No. 17 of 1975 10
Inmobiliaria Borinquen v. García Santiago, 295 F. Supp. 203 (1969) 9
In re Griffiths, 413 U.S. 717 (1973) 2, 3, 11, 14, 15
Insular Police Commissioner v. López, 160 F.2d 673 (1947) 8
Marín v. University of Puerto Rico, 346 F. Supp. 470 (D.P.R., 1972) 11, 13
Montalvo v. Colón, 377 F. Supp. 1332 (D.P.R., 1974).. 4
Mora v. Mejías, 206 F.2d 377 (1st Cir., 1953) 5
Moreno Ríos v. U. S., 256 F.2d 68 (1st Cir., 1958) 9
NLRB v. Security National Life Insurance, 494 F.2d 336 (1st Cir., 1974) 9
Oppenheimer Méndez v. Acevedo, 388 F. Supp. 326 (D.P.R., 1974) 13

Page

Ortiz v. Colón, 511 F.2d 1080 (1st Cir., 1974) 11, 13
Puerto Rico v. The Shell Co. (P.R.) Ltd., 302 U.S. 253 (1973) 6
Reetz v. Bozanich, 397 U.S. 82 (1970) 11, 12
Reid v. Covert, 354 U.S. 1 5
Rodríguez Salgado v. U. S., 277 F.2d 653 (1st Cir., 1960) 9
Santín Arias v. Examining Board, 353 F. Supp. 857 (1972) 11
SEC v. Quing Wong, 252 F. Supp. 608 (D.C.P.R., 1966) 9
Shelton v. Tucker, 364 U.S. 4796 14
Toa Baja Development Corp. v. García Santiago, 312 F. Supp. 899 (1970) 9
Truax v. Raich, 239 U.S. 33 (1915) 3
U.S. v. Carrión, 140 F. Supp. 226 (D.C.P.R. 1956) ... 9
U.S. v. De Jesús, 289 F.2d 37 (1st Cir., 1961) 9
U.S. v. Mejías, 131 F. Supp. 957 (D.C.P.R. 1955) 9
Wackenhut Corp. v. Aponte, 386 U.S. 268 (1967) 13
Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) 3
Zwickler v. Koota, 389 U.S. 31 (1962) 11, 12

STATUTES:

20 L.P.R.A. § 689 .....13, 16, 17
Civil Code of Puerto Rico 13
Art. 1483, 31 L.P.R.A. § 4124 .....13, 16, 17
P.L. 600, 48 U.S.CA. 731d 7, 9, 10, 14
P.R. Supreme Court, Rule 8 15

Constitution of the United States:

Article IV, § 3, cl. 2 .....5, 6, 8
Fourteenth Amendment 2, 3, 4, 5, 6, 12

Constitution of Puerto Rico:

Article II, § 1 12
Article II, § 7 12

Other:

U. S. Code Congressional Serv. (1950) Vol. 2 .. 7
Liebowitz, "The Applicability of Federal Law to the Commonwealth of Puerto Rico", 56 Geo. L.J. 219, 234-39 (1967). 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1267

EXAMINING BOARD OF ENGINEERS, ARCHITECTS AND SURVEYORS, etc., *Appellants*

v.

MARIA C. FLORES DE OTERO, *Appellee*

BOARD OF EXAMINERS OF ENGINEERS, ARCHITECTS AND SURVEYORS, AND THE MEMBERS OF SUCH BOARD, *Appellants*

v.

SERGIO PEREZ NOGUERIO, *Appellee*

On Appeal from the United States District Court for the District of Puerto Rico

---

BRIEF OF APPELLEES

QUESTIONS PRESENTED

I. Is an Alien Entitled to the Same Protection Under the Fourteenth Amendment as a Citizen?

II. Can 42 U.S.C.A. § 1983 Be Invoked by a Person Residing in Puerto Rico to Protect Fundamental Personal Constitutional Rights?

A. Does 42 U.S.C.A. Apply to the Territories Generally?

B. Is It the Purpose of 42 U.S.C.A. § 1983 to Include Puerto Rico Within Its Scope?

III. Can These Questions Involving Fundamental Personal Constitutional Rights Be Decided Without the Need for Abstention?

IV. Should This Court Apply the Strict Test of *In Re Griffiths* to the Justification Advanced by the Commonwealth for the Citizenship Requirement?

STATEMENT OF THE CASE

Appellees adopt the Statement made of the case by appellants at page 3 of their brief, as substantially correct.

SUMMARY OF ARGUMENT

Discrimination based on alienage alone is "invidious", hence, subject to the closest scrutiny. The right to work, to practice a profession, is a fundamental right, to which, aliens, as well as citizens, are entitled. Thus, the fact that a Fourteenth Amendment claimant to a fundamental right is an alien, is irrelevant to decision of the issue.

The case of *District of Columbia* v. *Carter,* 409 U.S. 418 (1973), held that, since it was the character and aim of the Civil Rights Act of 1871, as amended in 1874, 42 U.S.C.A. § 1983, to apply to territories because of the difficulty to Congress in regulating them directly, and since the District of Columbia does not present such a difficulty, it was not the intent of Congress to apply the Act to the District. Puerto Rico is more similar to a "State or Territory" than to the District of Columbia; hence, it must be the intent of Congress to have the Act apply to Puerto Rico as in

any "State or Territory". This intent has not changed since 1952, when the Constitution of Puerto Rico was adopted.

Abstention is inappropriate because the denial of a fundamental personal civil right is in issue, and because there is no complex, interlocking statutory or constitutional scheme in need of local clarification.

If the Civil Rights Act does apply to Puerto Rico, then it must apply as fully as in any "State or Territory". If not, the result would be the creation of a second-class citizenship for residents of Puerto Rico. The Commonwealth must therefore show a "compelling state interest" in justification of its classification, which it has failed to do.

ARGUMENT

I. AN ALIEN IS ENTITLED TO THE SAME PROTECTION UNDER THE FOURTEENTH AMENDMENT AS A CITIZEN.

It is indisputable—and undisputed—that for a State or territory to deny a lawfully admitted resident alien the right to earn a living solely because of his alienage is to deny him the equal protection of the laws under the Fourteenth Amendment, *Truax* v. *Raich,* 239 U.S. 33 (1915), and that such a right is a fundamental one, *In re Griffiths,* 413 U.S. 717 (1973); *Truax, supra.* Thus, lawfully admitted resident aliens are entitled to the same protection under the Fourteenth Amendment as are United States citizens, in this regard, and to deny the equal protection of the laws to aliens residing in Puerto Rico by finding the Civil Rights Act inapplicable *in* Puerto Rico is to deny it to the United States citizens residing in Puerto Rico. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886). The Common-

wealth ostensibly would deny this protection only to aliens residing in Puerto Rico. Implicit in this contention, however, is the unwarranted result that citizens of the United States residing in Puerto Rico would also be unprotected, since, in areas other than Puerto Rico, citizens and aliens are on the same footing in regard to the Act. For an extensive discussion of the application of Fourteenth Amendment rights to Puerto Rico, see *Montalvo* v. *Colón,* 377 F. Supp. 1332 (D.P.R., 1974).

II. 42 U.S.C.A. § 1983 CAN BE INVOKED BY A PERSON RESIDING IN PUERTO RICO TO PROTECT FUNDAMENTAL CONSTITUTIONAL RIGHTS.

In the present cases, lawfully admitted aliens resident in Puerto Rico are seeking relief from application to them of a statutory requirement of the Commonwealth of Puerto Rico which, were it a requirement imposed by one of the states, or by a territory (even as defined by appellants), would be a denial of the rights secured by the Fourteenth Amendment's equal protection clause. In asserting its right to this denial, the Commonwealth has attempted to exclude itself—as it must—from the meaning of the term "State or Territory" as used in the Civil Rights Act of 1871, 42 U.S.C.A. § 1983, which is the Fourteenth Amendment's enabling act. The basis for the exclusion in this Court's opinion in *District of Columbia* v. *Carter,* 409 U.S. 418 (1973).

A. Section 1983 Applies to the Territories Generally.

By its terms, Section 1983 provides a means of vindicating to anyone within the jurisdiction of the United States the rights, privileges, or immunities secured by the Constitution and laws, when they have been denied

by any other person acting under color of law of any state or territory.

Originally, the Act did not, by its terms, apply to action under color of the law of the territories. However, since 1874, when the Act was amended by the addition of the phrase "or territory", it has applied to such action. Although the purpose of the Act as it originally came into being seems to have been to provide indirect federal control over the unconstitutional actions of state officials (because in violation of Fourteenth Amendment rights), in amending the Act in 1874, Congress, acting under its power to regulate the territories under Act IV, § 3, cl. 2, extended the same type of protection without limitation to persons subject to the unconstitutional or illegal acts of territorial officials. *District of Columbia* v. *Carter, supra,* at footnote 11 and page 428, 409 U.S.

B. Puerto Rico Is Included Within the Scope of Section 1983.

Since before the adoption of the "compact" (P.L. 600), Puerto Rico was indisputably a territory subject to Article IV regulation, the Civil Rights Act, as amended in 1874, applied to actions of Puerto Rican officials.[1] Appellants argue, however, that after adoption of the compact in 1952, Puerto Rico's position in

---

[1] Certain cases, notably *Downes* v. *Bidwell,* 182 U.S. 244 (1901) and *Balzac* v. *Porto Rico,* 258 U.S. 298 (1922), established a distinction between "incorporated" territories, on the one hand, where the Constitution was deemed fully to apply, and "unincorporated" territories (of which Puerto Rico was one), on the other hand, where only certain "fundamental" rights were deemed available. However, this distinction was never made as to a Fourteenth Amendment right, and, in any case, appellees submit that after *Mora* v. *Mejías,* 206 F.2d 377 (1st Cir., 1953); *Reid* v. *Covert,* 354 U.S. 1 (1957), and *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), the distinction is no longer viable.

the federal scheme changed, and it was no longer a "territory" for purposes of the Civil Rights Act, and that because of this new position, Puerto Rico is, like the District of Columbia, *sui generis*. However, their reliance on the *Carter* decision in making this argument is inappropriate.

This Court in *Carter* followed its decision in *Puerto Rico* v. *The Shell Co. (P.R.), Ltd.*, 302 U.S. 253 (1973), in finding that "whether the District of Columbia constitutes a "State" or "State or Territory" within the meaning of any particular statutory provision depends upon the character and aim of the specific provision involved, "having due regard for 'the context, the purposes of the law, and the circumstances under which the words were employed' ". 409 U.S. at 420. Thus, "whether [the Commonwealth of Puerto Rico] constitutes a . . . "State or Territory" within the meaning of [Section 1983] depends upon the character and aim of this section.[2]

Generally, the primary purpose of the 1871 version of the Act was to enforce the provisions of the Fourteenth Amendment in the States of the Union, (*Carter,* at p. 423) and, after the 1874 amendment, to extend, not the Fourteenth Amendment itself, but the type of protection it provides, to the territories, as an exercise of the power of Congress under Article IV, as stated above, because of the difficulty experienced in controlling the territories directly and, as a consequence of the delegation by Congress of some of its powers to territorial legislatures, the similarity between the territories and the States insofar as enforcement of civil rights was concerned. *Carter,* pp. 430-431.

[2] The Court also stated that the fact that Congress did not have Puerto Rico in mind at the time of the enactment of a statute was not enough to exclude Puerto Rico from the operation of the act, but it was necessary to go further and say that if acquisition of Puerto Rico had been foreseen, Congress would have so varied its comprehensive language so as to exclude Puerto Rico from the operation of the act.

Thus, it was apparent that it was the intent of Congress to subject the territories to indirect control through the federal courts. As to the District of Columbia, which is subject to the direct, day to day regulation of Congress, legislation such as Section 1983 was unnecessary.

Finally, the Court found in *Carter* that the territories and the District of Columbia cannot be analogized because of their differences in origin. The District was found to be unique, *sui generis,* within the federal system because of its creation by the Constitution.

The appellants, on the other hand, state that the Commonwealth is also *sui generis,* and conclude that therefore, under *Carter,* Section 1983 is also inapplicable. The fallacy in this argument is that, even assuming that the Commonwealth is in some sense *sui generis,* it does not follow that it is exempt from the application of the Act. There may be more than one concept of uniqueness in the federal system, but if, under the *Carter* reasoning, Puerto Rico is not subject to direct, day by day regulation by Congress,[3] and the Act applied before the Compact, then it is the type of

[3] That it is demonstrated by the very purpose of P.L. 600, which was to permit the people of Puerto Rico to rule themselves on matters of purely local concern. U. S. Code Congressional Serv. (1950), Vol. 2, pp. 2681 ff. Indeed, it is fair to say that, as to local matters, Puerto Rico has achieved at least the same degree of autonomy as the States of the Union. It is this very fact which requires application of the Act.

"State or Territory" (without any need to further define this phrase) to which it was the aim and purpose of Congress to apply the Act.

In conclusion therefore, Puerto Rico is in the same position vis á vis the Civil Rights Act as a State or as any other area under United States jurisdiction, except the District of Columbia.[4]

Appellants claim that the Federal Court refused to apply the Act to Puerto Rico prior to 1952. However, the decision cited by appellants, *Insular Police Commission* v. *López,* 160 F.2d 673 (1947) *cert. den.* 331 U.S. 855, denied jurisdiction to the district court on the basis of Sec. 8 of the Selective Service Act of 1940, 50 U.S.C.A. App. 308 (a-c, e) which conferred jurisdiction on the court to require reemployment of veterans by private employers, but not by the U.S. government or the territorial government of Puerto Rico. The Court also held that there was no jurisdiction under the Civil Rights Act because the suit was not brought against public officials as individual wrongdoers depriving appellee of his civil rights, but against the insular government, a subordinate arm of the U.S. government which had not consented to suit. The present suit has not been brought against the U.S. government or Commonwealth government but against the members of the Examining Board of Engineers, Architects and Surveyors.[5]

[4] Interestingly, if the Court should find Puerto Rico to be *sui generis* in the *Carter* sense, that is, subject to direct, day-to-day Congressional regulation, then it must find that the source of Congressional power over Puerto Rico is the Article IV Territories Clause, in which case Section 1983 would also apply.

[5] The District Court for Puerto Rico has repeatedly denied suits under the Civil Rights Act against the Commonwealth government and its agencies because of the doctrine of sovereign immunity to suit without consent, but has allowed actions against public officials. *Condico Development Co.* v. *Santiago Vázquez,* 354 F. Supp. 1355 (1972); *Toa Baja Development Corp.* v. *García Santiago,* 312 F. Supp. 899 (1970); *Inmobiliaria Borinquen* v. *García Santiago,* 295 F. Supp. 203 (1969).

Since, therefore, the Civil Rights Act was never held inapplicable in Puerto Rico, and it applied to the territories, the Act was applicable to Puerto Rico prior to 1952. Section 9 of Public Law 600, 48 U.S.C.A. 734, states that the statutory laws of the United States not locally inapplicable shall have the same force and effect in Puerto Rico as in the United States.[6] In every case that raised the issue of continued applicability of a federal statute after 1952, the federal courts have determined that the statutes apply since the compact manifested the intent of Congress and the consent of the people of Puerto Rico to the continued application of the law without the necessity of further action by Congress.[7] In view of Section 9 of the compact it was not necessary for Congress to alter specifically all outstanding statutes in order to continue their effectiveness in Puerto Rico. *U.S.* v. *De Jesús,* 289 F.2d 37

[6] This phrase or its equivalent has appeared in every initial Congressional act governing a territory. See Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico,* 56 Geo. L. J. 219, 234-39 (1967).

[7] *NLRB* v. *Security National Life Insurance,* 494 F.2d 336 (1 Cir. 1974); *Rodríguez Salgado* v. *U.S.,* 277 F.2d 653 (1 Cir. 1960); *Moreno Ríos* v. *U. S.,* 256 F.2d 68 (1 Cir. 1958); *Americana of Puerto Rico* v. *Kaplus,* 368 F.2d 431 (3 Cir. 1966); *SEC* v. *Quing Wong,* 252 F. Supp. 608 (D.C.P.R. 1966); *Cooperativa de Seguros* v. *Manuel San Juan,* 289 F. Supp. 983 (D.C.P.R. 1968); *U. S.* v. *Carrión,* 140 F. Supp. 226 (D.C.P.R. 1956); *U.S.* v. *Mejías,* 131 F. Supp. 957 (D.C.P.R. 1955); *Arbona* v. *Kenton,* 126 F. Supp. 366 (D.C.N.Y. 1954); *Carrión* v. *González,* 125 F. Supp. 819 (D.C. P.R. 1954); *Consentino* v. *ILA,* 126 F. Supp. 420 (D.C.P.R. 1954).

(1st Cir. 1961). Recently the Supreme Court of Puerto Rico held a federal statute applicable before 1952 to have continued application after 1952 since it was of national scope and not locally inapplicable. *Highland Realty, Inc.* v. *Tribunal Superior,* Civil No. 0-73-167 Opinion No. 17 of 1975. No federal statute which does not specifically exclude Puerto Rico has been held not to apply after 1952 with the exception of certain provisions of the admiralty law on maritime tort already held not applicable before 1952.

In conclusion, the Civil Rights Act, a statute of scope throughout the jurisdiction of the United States, and applicable to the states and territories before 1952, was continued effective through Section 9 of P.L. 600 and applies with the same force and effect as in the United States.

III. THE QUESTION PRESENTED IN THIS CASE CAN BE DECIDED WITHOUT THE NEED FOR ABSTENTION.

Appellants argue that the District Court should have abstained from reaching the constitutional issue. They rely first of all on *Harris County Comm. Court, et al.* v. *Moore,* U.S. (1975), and state that the cited case stands for the proposition that abstention is appropriate where the meaning or scope of the local law under scrutiny is unsettled under the state constitution. Actually, the preceding case is merely a special instance of the general tendency to abstain when the federal constitutional challenge turns on an unclear state statute, that is, if it is possible that a state court interpretation of the challenged statute will define its scope so as to avoid the need for a federal constitutional ruling, then the federal courts should abstain from deciding the federal claim. Conversely, where

there is no such possibility, there is no reason to abstain. Moreover, abstention is the exception rather than the rule, *Zwickler* v. *Koota,* 389 U.S. 31 (1962); *Marín* v. *University of Puerto Rico,* 346 F.Supp. 470 (D.P.R., 1972); *Cintrón* v. *State Board of Education,* 384 F.Supp. 674 (1974). While it is true that this Court favored abstention in Puerto Rican cases in *Fornaris* v. *Ridge Tool,* 400 U.S. 41 (1970), the basis of the decision was the possibility of the judicial confinement of "a rather vague Puerto Rican law" to a more narrow ambit which would avoid all constitutional questions, *Fornaris, supra.*

In the present case, we are not dealing with a complex statutory scheme (as in *Harris County*), or a vague law (as in *Fornaris*), but rather with the validity, under the federal constitution, of the inclusion of the citizenship requirement in a particular statute. As the District Court stated, "no conceivable gloss placed upon [the statutory requirement of citizenship] by the Supreme Court of Puerto Rico could turn aside plaintiff's argument that this classification based on alienage is unconstitutional." In other words, it has already been decided that the classification is unconstitutional, *In re Griffiths, supra,* and the most the Puerto Rico Supreme Court could do, under a federal constitutional challenge, is agree with the plaintiff. Abstention has been found not proper in other Civil Rights cases in Puerto Rico where the statute was held to be absolutely clear and admitting of no possibility of variance in interpretation. *Ortiz* v. *Colón,* 511 F.2d 1080 (1st Cir., 1974); *Santín Arias* v. *Examining Board,* 353 F.Supp. 857 (1972).

Appellants argue, citing *Reetz* v. *Bozanich,* 397 U.S. 82 (1970), that the District Court should have ab-

stained in order to give the Puerto Rican courts an opportunity to determine the validity of the citizenship requirement in the light of Section 1 of Article II (birth or social origin) and Section 7, Article II (equal protection clause), of the Constitution of Puerto Rico.

The *Reetz* holding, like that in *Harris County Comm. Court* v. *Moore,* U.S. (1975), turned on the fact that the challenged statute in each case was part of a complex, integrated scheme of constitutional provisions and statutes. In neither case was a fundamental constitutional right involved, as in the present cases, but, rather, *Reetz* involved business or commercial interests, and *Harris County* involved only a limited number of people (as opposed to the present cases where the Commonwealth is attempting to deny all Puerto Rico residents protection under the Fourteenth Amendment).

The Commonwealth would argue that while it may be true that in the 50 States the distinction is made, in abstention cases, between economic rights and "fundamental civil rights," *Harman* v. *Forssenius,* 380 U.S. 528 (1965); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), in Puerto Rico the rule should be that abstention would apply in all federal question cases arising in Puerto Rico. This, of course, has the unsupportable result referred to in an earlier section of this brief, namely, the creation of a second-class constitutional right for all residents of Puerto Rico. Therefore, *Reetz* v. *Bozanich* is not controlling, and this Court should instead follow the *Zwickler* v. *Koota* ruling.

Appellants also argue (p. 7-8 Appellant's brief) that recent cases brought under the Civil Rights Act dealt with statutes which affected only purely local matters

and that none dealt with violations on account of race, religious belief or political philosophy. However, the District Court and the Court of Appeals for the First Circuit have found deprivations of rights because of political preference, *Oppenheimer Méndez* v. *Acevedo,* 388 F. Supp. 326 (D.P.R., 1974); *González* v. *González,* 385 F.Supp. 1226, deprivation of first amendment right, *Marín* v. *University of Puerto Rico,* 346 F. Supp. 470 (D.P.R., 1972); *Cintrón* v. *State Board of Education,* 384 F.Supp. 674 (1974), voting rights, *Ortiz* v. *Colón,* 511 F.2d 1080 (1974), and the right to privacy, *Acevedo* v. *Colón,* 377 F.Supp. 1332 (1974).

Appellants' argument that the District Court should have abstained so as to afford the Puerto Rico courts an opportunity to interpret the citizenship requirement in the light of Article 1483 of the Puerto Rico Civil Code was amply answered by the District Court in its opinion. To state that Article 1483 has to be construed in determining the validity of the citizenship requirement is to raise a false issue. The statute in question in these cases is not Article 1483, but 20 L.P.R.A. 689, which establishes the citizenship requirement.

The Commonwealth also attempts to apply the "due regard" concept of *Wackenhut Corp.* v. *Aponte,* 386 U.S. 268 (1967), an economic due process case, in which definitions of terms was required, and the "Spanish tradition" concept of *Fornaris* v. *Ridge Tool Co., et al.,* 400 U.S. 41 (1970), a commerce clause case, in which a "rather vague Puerto Rican law" was involved, to the present cases. The precedents, it is submitted, are inapposite where the claim is based on the deprivation of a fundamental constitutional right. To equate the deprivation of economic rights with the deprivation of fundamental, basic rights is to deny the

continuing validity of such cases as *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Shelton* v. *Tucker,* 364 U.S. 4796; and *Griffiths, supra.* Moreover, the Constitution of Puerto Rico is subordinated to the Constitution of the United States by Section 34 of the compact, 48 U.S.C.A. 731d; *ipso facto,* Commonwealth statutes must also be so subordinated.

Finally, appellants argue that the Supreme Court of Puerto Rico should be allowed to consider the validity of Commonwealth statutes. It is argued that, since appeals from the Puerto Rico Supreme Court to this Court are allowed by 28 U.S.C.A. 1258, there is no loss to constitutional claimants. However, if the claimant reserves his federal constitutional claim, as he has the right to do, *England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964), and only the local constitutional issue is litigated, then no appeal will lie and the claimant must then resort to the federal court. Appellants would ask this Court to rule that the federal claim *must* be litigated in the local courts (thus providing for appeal, if the validity of the statute under attack is upheld), but it has already decided that where Congress has opened the federal forum, the courts cannot close it. *England, supra,* and *England* would have to be modified in the case of claimants residing in Puerto Rico. To do this with regard to such fundamental constitutional rights as the right to work, is out of line with all constitutional thinking.

IV. THE STRICT TEST OF IN RE GRIFFITHS SHOULD BE APPLIED IN THIS CASE, AND APPELLANTS HAVE FAILED TO MEET THIS TEST.

Appellants would have this Court apply a less strict test to the justifications advanced for discriminating against aliens than the "compelling state interest"

standard used in *Griffiths.* If a test is to be applied, that is, if the Commonwealth is required to justify its discrimination, it must be because Section 1983 does apply, but, according to appellants, to a different extent. Thus, it is assumed that we are dealing with a fundamental right, but that this right can be more easily violated in Puerto Rico than elsewhere.

The standard suggested by appellants is that of *Dandridge* v. *Williams,* 397 U.S. 471 (1970). However, their reliance on the case is unjustified. In appellees' understanding, the rationale of the decision in *Dandridge* is completely opposite to the result sought by the Commonwealth. In *Dandridge,* this Court declined to apply a strict test to Maryland's regulations for distribution of Aid for Dependent Children funds, but only because there was "no contention that the Maryland regulation was infected with a racially discriminatory purpose or effect such as to make it inherently suspect", 397 U.S., footnote 17. Yet, *Griffiths,* following a line of cases, held that a classification based on alienage is "inherently suspect." Thus, the rationale of *Dandridge* must be inapplicable to the present cases.

In attempting to meet the "compelling state interest" standard, the Commonwealth cites statistics such as total population unemployment figures and per capita income of the general population, when clearly the relevant population is that of architects, engineers, and surveyors.

Finally, the fear expressed by appellants that alien engineers are less subject to local control than citizen engineers is unfounded and inherently illogical.[8] First

[8] To say nothing of the fact that aliens are not excluded from the practice of law (P.R. Supreme Court, Rule 8) or dentistry (20 L.P.R.A. § 80).

of all, as the statistics cited by appellants (footnote 7 of their Brief) show, half of the aliens residing in Puerto Rico are Cuban-born. Clearly, these aliens are not likely to "flee" back to Cuba to avoid legal obligations in Puerto Rico. Secondly, the statutory scheme grants full licenses to aliens who have received their degrees in Puerto Rico, 20 L.P.R.A. § 689(3)(a), Second Paragraph. Presumably, these aliens are just as free to leave Puerto Rico as are those who studied elsewhere.

In any case, the Supreme Court of Puerto Rico has held, in *Empresas Capote, Inc.* v. *Superior Court,* Case No. 0-75-14, Opinion No. 89 of April 29, 1975, that the term "contractor" as used in Article 1489 of the Civil Code, 31 L.P.R.A. § 4130, is not limited to the meaning tied in to engineering, but rather "extends to the broadest meaning covering the person who binds himself to another to bring about or produce certain results or activities in exchange for a price certain." (Translation by Appellees.) In other words, under *Capote,* one need not be an engineer to be a "contractor." While it is true that the person claiming to be "contractor" in that case was an architect, there is nothing in the quoted language to indicate that anyone, regardless of formal training, or licensure, may not be a contractor.

Article 1489 is in the same Chapter and Sub-chapter of the Civil Code (Hiring of Work and Services, Works at Price Agreed Upon or for Lump Sum), as Article 1483. The conclusion is inescapable that regardless of whether the contractor of a building is an engineer, or of whether he is an alien or not, he will be responsible for his negligence under Article 1483. The public policy relied on by appellants to justify the

alienage classification—that the Commonwealth should be allowed to control who is to become an engineer because of his responsibility under Article 1483—is evidently not regarded as important as appellants do, by the Supreme Court of Puerto Rico, since the effect of the decision is to allow anyone, without limitation, to become a contractor. If this is so, there is no justification for requiring engineers alone, of all the people who may choose to be contractors, to be citizens of the United States.

CONCLUSION

The Civil Rights Act of 1871, as amended, 42 U.S.C.A. § 1983, applies without limitation in Puerto Rico. Consequently, the denial of licensure as engineers, architects and surveyors to aliens, by 20 L.P.R.A. § 689, is a denial of the equal protection of the laws.

The judgment of the District Court should be affirmed.

Respectfully submitted,

San Juan, Puerto Rico, this 27th day of August, 1975.

MAX RAMIREZ DE ARELLANO
Attorney for María C. Flores de Otero

DR. SANTOS P. AMADEO
Attorney for Sergio Pérez Noguerio

Avenida Borínquen, 2067
Santurce, Puerto Rico 00914
(809) 726-3725